87-955

Supreme Court, U.S.
FILED
DEC 4 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 000000

In The

Supreme Court Of The United States

OCTOBER TERM, 1987

KEVIN PICKNEY,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

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QUESTION PRESENTED

Whether the trial court erred in allowing codefendant hearsay statements to be admitted when there was insufficient evidence of a conspiracy that was independent of the hearsay statements.

PARTIES INVOLVED

Petitioner, Kevin Pickney, was the defendant in the trial court, was the appellant in the Appellate Court of Illinois, and the petitioner in the Supreme Court of Illinois. Respondent, the People of the State of Illinois, was the prosecution (plaintiff) in the trial court, was the appellee in the Appellate Court of Illinois, and the respondent in the Supreme Court of Illinois.

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(1) The decision below improperly applied the requirements for the admission of a co-conspirator's hearsay statements. The trial court erred by allowing an alleged co-conspirator's hearsay statements to be admitted without a prima facie showing by the prosecution of a conspiracy independent of the hearsay statements. In finding that sufficient evidence of a conspiracy existed, the Appellate Court relied upon the very hearsay statements that must not be considered in determining a prima facie showing of a joint venture independent of the hearsay statements. This Court should grant certiorari to reiterate the principle that before the prosecution can introduce hearsay statements by an alleged co-conspirator, the prosecution must establish the existence of a conspiracy by evidence independent of the hearsay statements.

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IN THE

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KEVIN PICKNEY,

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vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

The petitioner, Kevin Pickney (hereafter, defendant) respectfully prays that a Writ of Certiorari be issued to the Appellate Court of Illinois, First District, to review its decision affirming his conviction.

JUDGMENTS AND OPINIONS BELOW

The opinion of the Appellate Court of Illinois, First District, affirming his conviction, No. 85-2356, is unpublished, but is enclosed in the Appendix. The order of the Supreme Court of Illinois denying petition for leave to appeal, No. 65189, October 7, 1987, is unpublished and is enclosed in the Appendix.

JURISDICTIONAL STATEMENT

On December 17, 1986, the Appellate Court of Illinois, First Judicial District, delivered its opinion affirming the defendant's conviction. (App.) His timely petition for leave to appeal was denied by the Supreme Court of Illinois on October 7, 1987. (App.) This petition to review the judgment of a state court of last resort in a criminal case is timely filed within 60 days thereafter. Jurisdiction of this Court is invoked under Title 28, U.S.C. section 1257(3) and Rule 20.1.

STATEMENT OF THE CASE

Nature of the Case

Defendant was charged by indictment with one count of delivery of a controlled substance. Following a bench trial before the Honorable Michael P. Toomin in the Circuit Court of Cook County, the defendant was found guilty and judgment of conviction was entered. The defendant was sentenced to six years imprisonment.

STATEMENT OF FACTS

Prior to trial, defense counsel filed a Motion for a Bill of Particulars. In response, the prosecution indicated that the alleged delivery of a controlled substance by Kevin Pickney occurred "at or near 9200 N. Chappel, Chicago, Illinois." (Supp. Record)

On July 11, 1984, at 12:00 o'clock in the afternoon, Officers Nathaniel Reed and Cassandra Black were seated in an unmarked Chicago police car. The officers were parked at 93rd Street and Chappel waiting to make an undercover narcotics buy from Curtis Epps. (R 2, 3, 8, 33) The officers testified that they had arranged to make this purchase earlier that day. (R 33-34) Over the objection of defense counsel, Officer Reed testified that at approximately 12:15 p.m., Epps entered the officers' vehicle and told the officers that

"his man was late and he will be delivering the package in about a half hour." (R 9) Epps then told the officers to drive to his home located at 9237 South Clyde. (R 9, 10)

After arriving at this address, Epps exited the vehicle and sat on his front porch, as the officers waited in their car. (R 10, 36) Approximately a half hour later, a blue Oldsmobile, driven by the defendant, pulled up behind the unmarked police car. (R 11, 36-38) Upon seeing the Oldsmobile pull up, Epps left the porch and approached the car. (R 11-12) As he did so, Epps had nothing in his hands. (R 15) Epps spoke to the driver of the Oldsmobile for a few minutes and was handed a clear plastic bag containing a white powder. (R 37-38) The contents of the bag weighed 54.4 grams and contained cocaine. (R 65)

Officer Reed testified that after Epps received the narcotics from the driver of the Oldsmobile, Epps entered the officers' car and said, "my man dropped off a package." (R 13) Officer Reed replied that he wanted to inspect the contents down the street. Reed drove northbound on Clyde, made a left turn, and parked between Clyde and Chappel. (R 15) As they drove to this location, Epps stated that "my man that dropped the package . . . will be back in approximately 10 or 15 minutes to pick up his share of the money." (R 16) After parking the car between Clyde and Chappel, the officers inspected the narcotics and handed Epps $4,700. (R 17) Epps was then arrested. (R 18, 42)

After arresting Epps, Officer Reed searched Epps and recovered $4,700 and a pager. (R 22-23) Reed testified that he had previously used the pager 6 or 7 times to contact Epps including that morning in order to arrange the cocaine buy. (R 23)

Officer Reed radioed the other members of the surveillance team and told them that Epps had been arrested and

that they were returning to 9237 South Clyde to apprehend the defendant. Shortly after Officers Reed and Black and codefendant Epps returned to the South Clyde Street address, Kevin Pickney arrived in an Oldsmobile, stopped in front of codefendant Epps' residence and then drove northbound on Clyde Street. (R 18-19, 45)

Officer Mark Sanders testified that he participated in the surveillance team. Officer Sanders testified that Officer Reed radioed that the driver of a blue Oldsmobile bearing license plate number ALU 205 was "at the location" and "may be involved" in the narcotics transaction. (R 52) When Kevin Pickney drove northbound on Clyde Street, Officer Sanders stopped the vehicle and placed Mr. Pickney under arrest. (R 54) During a search, the officers recovered $100 from Mr. Pickney's wallet, a small tote bag containing $890 and a pager from the car. (R 55-58)

After presenting these witnesses, the State rested without calling Curtis Epps as a witness. (R 66)

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW IMPROPERLY APPLIED THE REQUIREMENTS FOR THE ADMISSION OF A CO-CONSPIRATOR'S HEARSAY STATEMENTS. THE TRIAL COURT ERRED BY ALLOWING AN ALLEGED CO-CONSPIRATOR'S HEARSAY STATEMENTS TO BE ADMITTED WITHOUT A PRIMA FACIE SHOWING BY THE PROSECUTION OF A CONSPIRACY INDEPENDENT OF THE HEARSAY STATEMENTS. IN FINDING THAT SUFFICIENT EVIDENCE OF A CONSPIRACY EXISTED, THE APPELLATE COURT RELIED UPON THE VERY HEARSAY STATEMENTS THAT MUST NOT BE CONSIDERED IN DETERMINING A PRIMA FACIE SHOWING OF A JOINT VENTURE INDEPENDENT OF THE HEARSAY STATEMENTS. THIS COURT SHOULD GRANT CERTIORARI TO REITERATE THE PRINCIPLE THAT BEFORE THE PROSECUTION CAN INTRODUCE HEARSAY STATEMENTS BY AN ALLEGED CO-CONSPIRATOR, THE PROSECUTION MUST ESTABLISH THE EXISTENCE OF A CONSPIRACY BY EVIDENCE INDEPENDENT OF THE HEARSAY STATEMENTS.

The statements of Curtis Epps were hearsay and do not come within the co-conspirator exception to the hearsay rule. Before the prosecution may introduce hearsay statements, like those of Epps, who is alleged to be a co-conspirator, the prosecution must present substantial evidence independent of the hearsay statements which establishes the

existence of the conspiracy. *United States v. Anderson*, 782 F.2d 908, 913-914 (11th Cir. 1986); *United States v. Keplinger*, 776 F.2d 678, 705 n. 19 (7th Cir. 1985), cert. denied, 106 S.Ct. 2919 (1986); *United States v. Mouzin*, 785 F.2d 682, 692 (9th Cir. 1986); *United States v. Schepp*, 746 F.2d 406, 411 (8th Cir. 1984), cert. denied, 105 S.Ct. 1190 (1985); and *United States v. Nixon*, 418 U.S. 683, 701, 94 S.Ct. 3090, 3104 (1974). The law is equally clear that the hearsay statements themselves cannot be considered in determining whether the requirements of the rule have been met. *United States v. Stewart*, 770 F.2d 825, 830-831 (9th Cir 1985), cert. denied, 106 S.Ct. 888 (1986); *United States v. Perez*, 658 F.2d 654, 658-659 (9th Cir. 1981); and *United States v. Batimana*, 623 F.2d 1366, 1368 (9th Cir.), cert. denied, 101 S.Ct. 617 (1981).

A careful review of the record at bar reveals that the prosecutors failed to present substantial evidence of the alleged conspiracy which was independent of the hearsay statements. Prior to the admission of the alleged co-conspirator's statements, which were offered not by the alleged co-conspirator but by a police officer, the evidence introduced established that Kevin Pickney parked his car in front of Epps' house. According to the testimony of one of the police officers, Kevin Pickney drove up in a blue Oldsmobile and parked behind the unmarked police car. When Epps left the porch of his house, the officer indicated that Epps had nothing in his hands. The officer also stated that Epps spoke with the driver and was handed a clear plastic bag containing a white substance. The record does not indicate, however, whether Epps went directly from the defendant's car to the police officers' car. Rather, supposition is heaped upon supposition that Epps was merely the middle-man in this case. The trial court found this evidence, or lack of evidence, to be sufficient to allow the officer to testify as to what Curtis Epps purportedly said.

In resolving this issue on appeal, the appellate court erred by relying on the very hearsay statements that must not be considered in order to determine if a prima facie showing of a conspiracy existed by substantial evidence that was independent of the hearsay statements. In finding that sufficient evidence of a conspiracy existed, the appellate court stated, "Codefendant (Epps) had informed the officers that defendant was 'his man' who would bring the cocaine and expected to be paid. The statements of codefendant (Epps) facilitated the conspiracy to sell the cocaine to the officers." (Slip Op 8)

It was patently erroneous for the appellate court to consider the hearsay statements by Epps that defendant "was 'his man' who would bring the cocaine and expected to be paid," in their determination of whether there was substantial independent evidence to establish the conspiracy. Accordingly, this Court should not hesitate to grant certiorari to reiterate the principle that before the prosecution can introduce hearsay statements by an alleged co-conspirator, the prosecution must establish the existence of the conspiracy by evidence independent of the hearsay statements.

CONCLUSION

Based on the foregoing facts, authority and argument, this Honorable Court is urged to enter an order granting the defendant's petition for writ of certiorari.

Respectfully submitted.

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APPENDIX A
No. 85-2356

IN THE

APPELLATE COURT OF ILLINOIS

FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

vs.

KEVIN PICKNEY,

Defendant-Appellant.

Appeal from the Circuit Court of Cook County

Honorable
Michael P. Toomin,
Judge Presiding

ORDER DISPOSING OF APPEAL UNDER SUPREME COURT RULE 23

Following a bench trial defendant, Kevin Pickney, was convicted of delivery of a controlled substance (Ill. Rev. Stat. 1983, ch. 56-1/2, par. 1401(a)(2)) and was sentenced to a term of six years incarceration. On appeal, he contends that the State failed to prove him guilty beyond a reasonable

doubt, that the trial court erroneously admitted hearsay testimony, and that he cannot be held accountable for the conduct of a codefendant. [1]

The testimony of Officers Nathaniel Reed and Cassandra Black was substantially similar. Officer Reed testified that at noon on July 11, 1984, he and his partner, Officer Black, participated in a covert narcotics investigation in the 9300 block of South Chappel in Chicago. Both wore civilian clothing and sat in an unmarked police vehicle when codefendant approached them and told Officer Reed to drive to 9237 South Clyde because "his man was late" and "would be delivering the package in about a half hour" at codefendant's residence. When Officers Reed and Black and codefendant arrived at the latter's residence, codefendant exited the vehicle and sat on the porch while the officers remained in the squad car. Thirty minutes later a driver, who later was identified as defendant, arrived in a white-over-blue Oldsmobile and parked behind the police vehicle. Officer Reed copied its license plate number, ALU 205, and radioed four other officers in the surveillance team that the "package had been dropped," but that they should not approach defendant yet. Concomitantly, the empty-handed codefendant approached the passenger side of the Oldsmobile, leaned into the car through the window, conversed with defendant, then walked away from the car while carrying a transparent plastic bag that contained a white-powdered substance. Next, codefendant returned to the police vehicle, sat on the rear seat and said "that was my man that dropped the package and he will

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[1] Curtis Epps was arrested with defendant and charged with delivery of a controlled substance and possession of cannabis with intent to deliver. However, he was tried separately from defendant upon the court's granting the latter's motion for severance. He did not take part in this appeal.

be back in approximately 10 or 15 minutes to pick up his share of the money."

Officer Reed drove northbound on Clyde, turned left, then parked between Chappel and Clyde and told Officer Black to get into the back seat. When Officer Black did so, codefendant passed her the plastic bag and Officer Reed gave codefendant $4,700. While codefendant counted the money, Officer Reed asked Officer Black if she wanted her purse. She said that she did and Officer Reed turned, produced his badge and weapon, and identified himself as a police officer, then placed codefendant under arrest and advised him of the Miranda rights. Next, the officer radioed the other members of the surveillance team and told them that codefendant had been arrested and that they were returning to 9237 South Clyde to apprehend defendant who would arrive in 15 minutes. Shortly after Officers Reed and Black and codefendant returned to the Clyde Street address, defendant arrived in the Oldsmobile, stopped in front of codefendant's residence, then drove northbound on Clyde. Within five minutes police officers returned with defendant and the Oldsmobile.

During a search of codefendant, Officer Reed recovered the $4,700 and a pager bearing the number 592-3798. Officer Reed added that he had previously paged codefendant seven times. The officer also stated that he inventoried the pager and the white substance which he took to the crime laboratory.

Officer Cassandra Black added that at noon on July 11, 1984, she and Officer Reed drove to codefendant's residence to purchase two ounces of cocaine that they had previously ordered from him by contacting him through the pager. She also stated that twice before they had purchased cocaine from codefendant after contacting him through the pager. When defendant parked near codefendant's residence, Of-

ficer Black viewed his face from the passenger seat of the police vehicle.

Officer Mark Sanders testified that at noon on July 11, 1984, he participated in the surveillance of a narcotics purchase with six other officers. Officer Sanders was in a civilian car with Detective Benigniew at 12:45 p.m. when Officer Reed radioed that the driver of a blue Oldsmobile bearing license plate number ALU 205 was "at the location" and "may be involved" in the narcotics transaction. Fifteen minutes later, Officer Black radioed that the "deal had been completed," that one of the suspects had been arrested, and that the driver of the Oldsmobile would return in a few minutes. Officer Sanders then drove to the scene of the crime. When he and his partner were near 92nd and Chappel, they observed defendant in the previously identified Oldsmobile, stopped him, identified themselves, and arrested defendant. During a search, the officers recovered $100 from defendant's wallet, a small tote bag containing $890 and a pager from the car.

A stipulation was entered that if Peter Poole testified, he would state that he was a chemist for the police department, that he examined the white-powdered substance seized by the officers from codefendant, that it weighed 54.40 grams, and that it was cocaine.

We shall first consider defendant's contention that the State failed to prove him guilty beyond a reasonable doubt in violation of the due process clause of the fourteenth amendment to the Federal constitution. When the sufficiency of an indictment has been challenged at trial, the standard of review is whether the indictment states the nature of the offense and sets forth each of the elements of that offense. (*People v. Harper* (1985), 135 Ill. App. 3d 846, 848, 482 N.E.2d 412.) Case law requires that an indictment be specific enough to inform the accused of the offense with which he

is charged, to enable the accused to prepare a defense, and to permit him to plead the judgment as a bar to future proceedings for the offense. (*People v. Sims* (1982), 108 Ill. App. 3d 648, 651, 439 N.E.2d 518.) So long as the statutory language used describes specific conduct, there is no need for the charge to specify the exact means by which the conduct was executed. If the defendant desires additional specificity, he may move for a bill of particulars. *People v. Wisslead* (1985), 108 Ill. 2d 389, 397, 484 N.E. 1081.

In order to sustain a conviction for the offense of unlawful delivery of cocaine, the State must prove beyond reasonable doubt that the defendant knowingly delivered or possessed with the intent to deliver 30 grams or more of any substance containing cocaine. (*People v. Zambetta* (1985), 132 Ill. App. 3d 740, 749, 477 N.E.2d 821.) Guilt of commission of a crime on the basis of accountability may be established entirely by circumstantial evidence. (*People v. Harris* (1981), 96 Ill. App. 3d 970, 974, 422 N.E.2d 208.) To be accountable for the acts of another, one must have a specific intent to promote or facilitate the commission of a crime. (Ill. Rev. Stat. 1985, ch. 38, par. 5-2.) Such intent may be proved by evidence that the defendant shared the criminal intent of the principal or that there was a community of unlawful purpose. The latter is shown by prior deliberation to commit the specific offense or by the spontaneous and combined participation of a group in the perpetration of the offense. *People v. Torres* (1981), 100 Ill. App. 3d 931, 938, 427 N.E.2d 329.

The defendant in the instant case claims that the evidence was insufficient to prove his guilt beyond a reasonable doubt because the arguments presented by the State were inconsistent, the bill of particulars showed that the delivery occurred at 9300 South Chappel and not at 9237 South Clyde, and the State failed to prove that there was an agreement be-

tween defendant and codefendant, or that defendant knew that codefendant would deliver the cocaine to a third party. Notwithstanding, the evidence presented by the State revealed that upon conducting a covert narcotics investigation, Officers Reed and Black twice purchased cocaine from codefendant and arranged to purchase the two ounces which are the subject of this case. Following a previously arranged meeting, the officers drove codefendant to his residence in their unmarked squad car. Codefendant exited the vehicle and sat on his porch while the officers remained in their squad car. When defendant arrived alone in his Oldsmobile, codefendant, empty-handed, approached the passenger side of the vehicle, talked with defendant who sat in the driver's seat, then returned to the squad car carrying a transparent plastic bag which contained a white-powdered substance. After codefendant entered the police car, Officer Reed drove around the corner and parked. Officer Black then joined codefendant in the rear of the car. When he passed her the package, she inspected it and determined that it was cocaine. Officer Reed then passed codefendant the money. When he counted it, the officers placed him under arrest. Officer Reed contacted other members of the surveillance team, then returned to codefendant's residence to await defendant. When the latter appeared within 10 minutes, he stopped his vehicle in front of codefendant's residence, then sped away, but was apprehended by other officers who returned him to the scene of the crime.

Here, the evidence disclosed that defendant delivered the cocaine to codefendant, who in turn delivered it to the officers in exchange for $4,700. Defendant's flight could be construed by the court as consciousness of guilt. The indictment properly charged both offenders with delivery of cocaine. Defendant suggests that the indictment conflicted with the proof in that the bill of particulars stated that the offense occurred "at or near 9200 N. Chappel, Chicago, Il-

linois." but the evidence presented at trial indicated that the location was at 9237 South Clyde and that the investigation occurred in the 9300 south block of Chappel. As the trial court noted, Chappel and Clyde are contiguous with each other. Further, the abbreviation for north instead of south was apparently a typographical error since there is no such location as "9200 N. Chappel" in the city. Under the circumstances, we believe that the evidence was sufficient to support defendant's conviction for unlawful delivery of cocaine.

Defendant next asserts that the trial court improperly admitted hearsay testimony of Officer Reed regarding statements attributed to codefendant. Evidence admitted under the coconspirator exception to the hearsay rule does not violate the confrontation clause of the sixth amendment because defendants are able to confront and cross-examine the witnesses who allege that the statements at issue were made. (*People v. Fuller* (1983), 117 Ill. App. 3d 1026, 1037, 454 N.E.2d 334.) All that is required is that the state show a prima facie case of conspiracy. (*People v. Cortes* (1984), 123 Ill. App. 3d 816, 822, 463 N.E.2d 885.) The prima facie case for conspiracy may be made before or after the introduction of the alleged hearsay testimony. *People v. Fuller* (1983), 117 Ill. App. 3d 1026, 1037, 454 N.E.2d 334.

In the instant cause, there was sufficient independent evidence of a conspiracy. As we have indicated, after police officers arranged to purchase cocaine from codefendant, they drove him to his residence where he sat on a porch to await defendant. The officers remained nearby in their vehicle. When defendant arrived in an Oldsmobile, codefendant, who was empty-handed, approached the car, talked to defendant, leaned inside the vehicle, then returned to the officers' car carrying a transparent bag containing a white substance. When the officers inspected the package, they

determined it contained cocaine and arrested codefendant. The officers then returned to codefendant's residence and awaited defendant. Within 10 minutes the latter returned, stopped his car, and sped away, but was arrested by other members of the surveillance team. Codefendant had informed the officers that defendant was "his man" who would bring the cocaine and expected to be paid. The statements of codefendant facilitated the conspiracy to sell the cocaine to the officers. We believe that the officers' testimony regarding codefendant's statements, which identified defendant's participation in the narcotics transaction, were admissible as the statements of a coconspirator and served to prove defendant's guilt beyond a reasonable doubt.

Defendant also maintains that he could not be held accountable for the conduct of codefendant. In order to hold a defendant accountable for the conduct of another, the State must prove beyond a reasonable doubt that (1) defendant solicited, aided, abetted, agreed or attempted to aid another person in the planning or commission of the offense; (2) this participation must have occurred either before or during commission of the offense; and (3) it must have been with the concurrent, specific intent to promote or facilitate the commission of the offense. *People v. Edwards* (1984), 128 Ill. App. 3d 993, 999, 471 N.E.2d 957.

Our review of the evidence convinces us that defendant was proved accountable for delivery of cocaine by codefendant. Defendant delivered the cocaine to codefendant who immediately sold it to the undercover police officers for $4,700.

For the reasons stated above, the judgment of the circuit court of Cook County is affirmed.

RIZZI, P.J., McNAMARA and WHITE, JJ.

APPENDIX B

IN THE

APPELLATE COURT, STATE OF ILLINOIS

FIRST DISTRICT

No. 85-2356

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

vs.

KEVIN PICKNEY,

Defendant-Appellant,

ORDER

This cause coming on to be heard on defendant-appellant's petition for rehearing, the court being fully advised in the premises;

IT IS ORDERED that the petition for rehearing is denied.

Dated at Chicago, Illinois this 30th day of March 1987.

Dom Rizzi
Daniel J. McNamara
William S. White

APPENDIX C

ILLINOIS SUPREME COURT
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October 7, 1987

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No. 65189 – People State of Illinois, respondent, v. Kevin Pickney, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 29, 1987.